LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
AUG 28 1968
JOHN F. DAVIS, CLERK

No. 452

In the

Supreme Court of the United States

OCTOBER TERM, A.D. 1968

RICHARD JEWELL NEWLAND,

Petitioner,

vs.

THE STATE OF INDIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

DEAN E. RICHARDS,
156 E. Market 4th Floor
Indianapolis, Indiana
Counsel for Petitioner.

PALMER K. WARD
919 Electric Building
Indianapolis, Indiana
Of Counsel

The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Statement of Jurisdiction	2
Questions Presented	2
Statement of The Case	7
Argument	11
Conclusion	16
Appendix A	1a
Appendix B	6a
Appendix B-1	8a

AUTHORITIES CITED

Lane v. Brown, 372 U.S. 477, 9 L.Ed. 2d 892, 83 S.Ct. 768 (1963) 2, 3, 4, 10

Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891 2

Rule 2-40A Supreme Court of Indiana 3

Fay v. Noia, 372 U.S. U.S. 391, 9 L.Ed. 2d 837, 83 S.Ct. 822 (1963) 4

State ex rel, Macon v. Orange Circuit Court—and—198 N.E. 2d 229 (1964) 12

Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1968

No.

RICHARD JEWELL NEWLAND, *Petitioner,*

vs.

THE STATE OF INDIANA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

To the Chief Justice of The United States and the Associate Justices of The United States Supreme Court:

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the final judgment of the Supreme Court of Indiana which affirmed the judgment of the lower court denying petitioner leave to file a belated motion for new trial and remanding him to prison for the remainder of his natural life.

THE OPINION BELOW

The opinion of the Supreme Court of Indiana in this matter is reported at 236 NE2d 45, but it is not as yet reported in the official reporter of the Supreme Court of Indiana. A copy of the opinion is hereto annexed in

Appendix A. A Petition For Rehearing was filed and denied as is shown by Appendices B & B-1.

STATEMENT OF JURISDICTION

The decision and judgment of the Indiana Supreme Court was entered on April 22, 1968. The petitioner's Petition For Rehearing was filed on May 10, 1968 within twenty days of the Supreme Court of Indiana's decision as required by rule and it was denied on June 12, 1968.

That statutory provision believed to confer upon this Court, jurisdiction to review the judgment in question by Writ of Certiorari is Title 28, United States Code, Section 1257 (3).

QUESTIONS PRESENTED

1. Whether it constitutes "equal protection of the law" as required by *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed. 2d 892, 83 S.Ct. 768 (1963) and *Griffin* v. *Illinois,* 351 U.S. 12, 76 S.Ct. 585, 591, 100 L.Ed. 891 to create a *coram nobis* appeals procedure which permits pauper convicts to have their complaint heard on the merits by the appellate tribunal in all cases but which places convicts who do not qualify for pauper status totally at the mercy of the original trial court upon its arbitrary determination without guidelines as to whether due diligence has been exercised by the moving party.

2. Whether it constitutes an adequate implementation of this Court's dictates regarding Indiana's *"coram nobis"* appellate system which were expressed in *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed. 2d 892, 83 S.Ct. 768 (1963) which held that the Public Defender could not become an appellate tribunal of last resort unto himself,

to create a *"coram nobis"* procedure which empowers trial courts to reject all matters which were not raised in an original motion for new trial which could have been raised in that motion on the ground that failure to raise it originally is lack of due diligence *per se* without further inquiry.

3. Whether it constitutes an adequate implementation of this Court's dictates regarding Indiana's *"coram nobis"* appellate system which were expressed in *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963) which held that the Public Defender could not become an appellate tribunal of last resort unto himself, to create a post conviction procedure which makes a criminal defendant's trial counsel undertake the very rule which this Court has held could not be vested in the Public Defender and which this Court impliedly has held could not be vested anywhere other than the appellate tribunal itself.

4. Whether *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed 2d 892, 83, S.Ct. 768 (1963) should be reconsidered in the light of the fact that its holding was based upon an incorrect understanding of the facts of the then existing Indiana system of appellate procedure and it has compelled the creation of an unconstitutional usage embodied in Rule 2-40 and 2-40A of the Supreme Court of Indiana.

5. Whether a usage embodied in Rule 2-40A of the Supreme Court of Indiana which was prompted by *Lane* v. *Brown,* 372 U.S. 477, 9 L.Ed. 892, 83 S.Ct. 768 (1963) deprives all appellants of the due process of law in that *Lane* v. *Brown* has compelled the Supreme Court of Indiana to adopt a screening process in order to avoid an inundation of its docket which screening process is based upon a doctrine of implied waiver which is in direct

derogation of the waiver-of-fundamental-rights doctrine put forth by the United States Supreme Court in a companion case to *Lane* v. *Brown*, that is, *Fay* v. *Noia*, 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 (1963).

CONSTITUTIONAL PROVISIONS INVOLVED

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the United States, Amendment XIV, Section 1.

RULES AND USAGES BEING QUESTIONED

In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion shall be filed and shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of the filing of such motion, and as assignment of error on appeal to the effect that the trial court erred in overruling said motion shall be the only means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently.

Rule 2-6, Supreme Court of Indiana

Hereafter no court shall have jurisdiction to entertain any action for a writ of error *coram nobis* in any criminal case, but the remedy heretofore granted in such a proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefor is alleged to have orig-

inated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived. Trial counsel representing a defendant or the defendant *pro se* shall, in all cases where meritorious grounds exist therefor, file a motion for a new trial within the time prescribed by the rules of this Court. If no timely motion for a new trial is filed by a defendant's trial counsel or by the defendant *pro se*, it may be considered as evidence by the court that no meritorious grounds exist for a new trial or for an appeal, or if any meritorious grounds did exist, there is an acquiesence in, and an acceptance of, the judgment of the trial court by the defendant.

Rule 2-40, Supreme Court of Indiana
(1st two paragraphs)

Rulings of petitions to file belated appeals, rulings on petitions to file belated motions for a new trial and rulings on belated motions for new trial (when because of the expiration of time it is impossible to incorporate the alleged errors in a regular appeal in the original criminal case), may be reviewed only on petition for a writ of certiorari in the Supreme Court of this State.

A petition for a writ of certiorari shall be verified, shall set forth specifically the grounds therefor and may be supported by a brief. A copy of the petition and brief shall be served on the attorney general at the time of filing. To this petition the attorney general shall file a response under oath, admitting, denying or stating additional facts (by affidavit or otherwise) pertaining to the issue involved, together with brief in support thereof. If there is a conflict as to the statement of the record below, this Court may direct the clerk below to prepare a certified copy of that portion of the record in dispute and file the same in this Court.

If the conflict concerns the evidence, the trial court may be directed to recite in narrative form the evi-

dence pertinent to the issue and certify to the same as a bill of exceptions containing all of the evidence pertaining to the issue involved.

It shall be the duty of the public defender or the State of Indiana to represent indigent persons who are inmates of penal institutions of the State of Indiana after their time for regular or timely appeal has expired, if requested so to do, in the filing of petition for delayed appeals, petitions for belated motions for a new trial, and petitions for writs of certiorari if he, after dilligent inquiry, finds any grounds upon which to sustain such proceedings. In the event of the failure or refusal of the public defender to represent any petitioner in such cases (as provided by Rule 2-40), upon petition filed in the clerk's office of the Supreme Court setting up such facts that the public defender has failed or refused to represent them, a citation shall be issued to the public defender by this Court to show cause why he does not represent the petitioner, and he shall file his response and report with the clerk of this Court, which shall become a part of the record in this cause. Upon due consideration of said response and report, the Court shall determine whether or (sic) not an order shall issue requiring the public defender to represent the petitioner.

In the event proceedings are in *forma pauperis*, no costs shall be taxed against petitioner for transcripts, bills of exceptions and certified copies of the record in such case; otherwise the costs shall be taxed as provided by law.

The petition and brief for writ of certiorari shall be filed within sixty (60) days after the rulings complained of and the response thereto within thirty (30) days after the filing of the petition for the writ. The petitioner may file a reply brief within ten (10) days after the filing of response. No other briefs or pleadings shall be filed. Six (6) copies of the petition and brief, and response and the reply brief shall be filed with the clerk.

The Court may grant the writ if it finds meritorious grounds for a review of the trial court's action exist, and make such order, final or otherwise, as may be appropriate.

Provided further, that where the petition for the writ does not meet with the rules of this Court, the same may be denied under the same circumstances, conditions and for the same reasons given, if any, by the United States Supreme Court in denying like petitions.

Rule 2-40A, Supreme Court of Indiana

STATEMENT OF THE CASE

On December 6, 1965 the petitioner was convicted in Division One of the Criminal Court of Marion County, Indiana of the crime of manslaughter and thereafter he was sentenced to a term of not less than two nor more than twenty-one years in the Indiana State Penitentiary. From this conviction a direct appeal was taken which has no relevance to this petition.

On September 12, 1967 the petitioner filed a Verified Petition to File A Belated Motion For New Trial relating to his aforesaid conviction. Tendered with this Verified Petition pursuant to the rules of the Supreme Court of Indiana was a Belated Motion For New Trial alleging that new and pertinent evidence had been discovered three days earlier and an affidavit of one L. C. Wilson which read as follows:

L. C. Wilson, being first duly sworn upon his oath, deposes and says:

That I now am and was on October 16, 1963 a resident of the State of Indiana and County of Marion. I now live at 609 E. 20th Street, Indianapolis, Indiana.

About four years ago, in the afternoon, I was standing in front of a record shop known as "Johnny

P's". This record shop was in the 1800 block of North College Avenue, Indianapolis, Indiana. I noticed a lady who ran out in the street and then she came over to where I was standing in front of the record shop. She told me and John Pierce, Jr., the fellow who ran the record shop, that she had been shot. She was with another lady. John Pierce, Jr. told her to come into the record shop and sit down which she did. The lady who was with her came into the record shop and stood beside her. While they were in there I saw the lady who said she had been shot take a knife or dagger out of her blouse and hand it to the lady who was with her. I didn't see what this lady then did with this knife as it got very crowded in there because of the excitement. I didn't know these two ladies and I don't know them now.

I work for Erbrich Products Company at 1120 E. 32nd Street, Indianapolis, Indiana. I work in packing and shipping for them and they are a food products company.

The record shop is no longer in business and John Pierce, Jr., known as "Johnny P" is now deceased.

(jurat) L. C. Wilson

L. C. Wilson

On October 10, 1967 the local prosecuting attorney answered the aforesaid Verified Petition To File Belated Motion For New Trial contending that the newly discovered evidence related in the tendered Belated Motion For New Trial was merely "cumulative" and would not have changed the outcome of the original trial if it had been presented at that time. The prosecutor's entire response went to the merits of the tendered Belated Motion For New Trial and it did not relate to the merits of the petition to file same. In his said petition the petitioner alleged that he had been duly diligent in seeking out and discovering the said evidence and in bringing it to the attention of the trial court immediately after its dis-

covery. In its response the State of Indiana did not contend otherwise and the question of due diligence was never argued before the trial court.

On February 7, 1968 there was an oral argument on the Petitioner's Verified Petition To File Belated Motion For New Trial and the trial court at that time overruled same and denied leave to file the tendered Related Motion For New Trial.

A portion of Indiana Supreme Court Rule 2-40 which is not quoted above because that portion of the rule is not under attack herein provides as follows:

> The petition (for a belated motion for a new trial) must be personally verified by the party, specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause, and why such cause could not have been discovered before by the exercise of due diligence. The court, upon finding substantial evidence of such facts, and that the movant acted as promptly as reasonably possible, shall approve the filing of said belated motion for a new trial.
>
> **Rule 2-40, Supreme Court of Indiana (third paragraph)**

The clear mandate of the above-quoted portion of Indiana Supreme Court Rule 2-40 is that a Verified Petition To File Belated Motion For New Trial may be denied only where there is a finding that due diligence was not exercised. Here the question of due diligence had not even been placed at issue in the trial court but, nonetheless, when the petitioner filed his Petition For Certiorari in the Indiana Supreme Court pursuant to the previously quoted Rule 2-40A on February 9, 1968, two days after the adverse ruling by the trial court, the Attorney General of the State of Indiana responded on March 11, 1968

with the only ground that could be presented in justification of the trial court's ruling: "That Petitioner has failed to show that he exercised due dilligence as required by Rule 2-40." Cited in support of this allegation was the Indiana Supreme Court's decision in *Langley* v. *State*, ... Ind. ....., 232 NE2d 611 (1968) (an appeal from which decision was docketed in this Court on June 18, 1968.)

On April 22, 1968, in the decision appearing hereinafter in Appendix A, the Indiana Supreme Court, by and through three of its justices, ruled that it could not disturb the trial court's discretionary determination as to whether the petitioner had exercised due diligence—this, in spite of a record which showed that the trial court had not even considered the matter of due diligence. The other two justices of the Indiana Supreme Court concurred in the result, recognizing that the present appeals system in Indiana renders it impossible to afford appellate relief if the trial court refuses permission to file a belated motion for new trial and noting that the petitioner's attempted appeal, in the light of the said rules and usages thereunder, was "a useless exercise in futility for both the petitioner and this (The Indiana Supreme) court."

ARGUMENT

The statement of facts in this case truly should begin with this Court's decision in *Lane* v. *Brown*, 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963) where it was held that it constituted an unconstitutional denial of equal protection of the law to make a pauper's right to have a pauper transcript of his original trial contingent upon the approval of the Public Defender of the State of Indiana.

The concurring opinion of Justice Clark in *Lane* v. *Brown* demonstrates that this Court was operating under a misconception as to the mechanics of Indiana *coram nobis* procedure when the said decision was rendered:

> I think it falls short of the requirements of due process for a State to foreclose an indigent from appealing in a case such as this at the unreviewable discretion of a Public Defender by whom, or by whose office, the indigent has been represented at the trial.
>
> *Lane* v. *Brown*, 372 U.S. at 485, 9 L.Ed. at 898.

The Public Defender of the State of Indiana never has had any connection with defenses at the trial level and, in directing itself to the problem of a defendant's trial counsel, being in a position to foreclose his client from undertaking an appeal by acting as an appellate court unto himself, the *Lane* v. *Brown* decision directed itself to a problem which did not exist at the time. Ironically, however, the steps which the Indiana Supreme Court has taken in the light of the *Lane* v. *Brown* decision have created the very situation which this Court apparently thought it was eradicating in *Lane* v. *Brown*.

The Indiana Supreme Court, by its Supreme Court Rules and by its decisions has created the presumption

that any possible appellate questions, however much they may involve a violation of fundamental rights, are to be deemed waived by a convicted accused unless they are presented with exactitude in a Motion For New Trial within thirty days after conviction (See Rules 2-6 and 2-40, Supreme Court of Indiana as set forth in the Rules and Usages Being Questioned section of this petition) and such a waiver is to be presumed because it is further presumed that competent trial counsel will file an adequate motion for new trial if such a motion is appropriate:

> As judges, who as lawyers have engaged in trial work, we know that competent trial counsel, can, should and will make adequate notes and memoranda during trial for use in preparing a motion for a new trial.
>
> . . . a pauper and a rich man alike are bound in this state by the action or non-action of competent trial counsel. So far as we can find, that principle is true in federal courts if there is a failure to file a motion for a new trial within five (5) days. . . .
>
> *State ex rel. Macon* v. *Orange Circuit Court* ..... Ind. ....., 198 NE2d 229 (1964).

This approach to the problem is entirely contrary to the doctrine of implied waiver which was expressed in this Court's opinion in *Fay* v. *Noia* which was decided the same day as *Lane* v. *Brown*:

> The classic definition of waiver enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 ALR 357—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard. If a *habeas* applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims

> in the state courts, whether for strategic, tactical or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on *habeas* to deny him all relief.
>
> *Fay* v. *Noia*, 372 U.S. 391, 439, 83 S.Ct. 822, 9 L.Ed.2d 837, 869 (1963)

Contrary to the manifest dictates in *Fay* v. *Noia* the doctrine of "implied waiver" has become a very prominent means of disallowing appeals in Indiana and contrary to the manifest dictates of the above-quoted separate opinion in *Lane* v. *Brown* disallowances occur as an automatic result of the action or inaction of trial counsel subsequent to conviction.

In petitioner's case the Indiana Supreme Court's implied-waiver theory was carried to an extreme. The petitioner was held to have impliedly waived his right to present newly discovered evidence by his failure "to exercise due diligence." Petitioner's failure "to exercise due diligence" in turn was implied solely from the trial court's decision denying him leave to file his Belated Motion For New Trial and this later inference was based solely on the fact that a lack of due diligence was the only legal ground which the trial court could have invoked such a denial under the provisions of Ruly 2-40, Supreme Court of Indiana (third paragraph) supra, and this latter inference was drawn notwithstanding the fact that the matter of due diligence had not been at issue in the trial court proceedings. The said inference was based, in short, upon what the two concurring justices of the Indiana Supreme Court in their decision herein characterized as "some child-like faith in the inherent wisdom of that (the trial) court." (See Appendix A)

Rule 19 of this Court outlines the "considerations governing review on certiorari" and includes among those types of cases in which the granting of certiorari is likely to be deemed appropriate, cases "where a state court has decided in a way probably not in accord with applicable decisions of this court." At issue here is the constitutionality of the implementation of the dictates of this Court in *Lane* v. *Brown* by the Indiana Supreme Court. The petitioner's contention that *Lane* v. *Brown* has not been properly implemented is a highly probable one in view of two manifest facts: 1) *Lane* v. *Brown* was based upon a misapprehension of Indiana's post conviction procedures and the "reforms" which have taken effect since *Lane* v. *Brown* have brought into being the very situation which the *Lane Brown* decision mistakenly believed to exist and intended to eliminate; 2) Two of the five judges of the Indiana Supreme Court state flatly in the decision herein that the Supreme Court Rules which were brought into being as a result of *Lane* v. *Brown* are much in need of change. In view of the obvious confusion inherent in the *Lane* v. *Brown* decision itself and manifest in the changes in Indiana appeals procedure which have resulted from that decision, petitioner believes it to be essential that there be some pronouncement and clarification by this Court on the matters which it attempted to resolve in *Lane* v. *Brown* before any additional experiments or changes are undertaken by the Indiana Supreme Court.

Petitioner's standing to raise this issue and seek the benefits of such a clarification is based upon the fact that he has been victimized by the changes wrought by *Lane* v. *Brown* in that he, who is not a pauper defendant, has lost the *coram nobis* rights which he would have had prior to *Lane* v. *Brown* and the amendment to Rule 2-40 and the enactment of Rule 2-40A by the Indiana Supreme

Court while pauper defendants now enjoy those rights. Prior to *Lane* v. *Brown* the petitioner could have filed his Belated Motion For New Trial (or *coram nobis*) without leave of court and obtained an adjudication on the merits both in the trial court and on appeal. Under the present appeals system in Indiana he remains totally at the mercy of the trial court as two justice of the Indiana Supreme Court have noted herein. Prior to *Lane* v. *Brown* a pauper defendant who had need of a transcript to vindicate his *coram nobis* rights was totally at the mercy of the Indiana Public Defender. Under the present appeals system in Indiana a pauper defendant can have the merits of his *coram nobis* brought to the attention of a court other than the court in which he was convicted, *i.e.* the Indiana Supreme Court, in any case where the Public Defender fails to take action. No such remedy is open to a solvent defendant as he is totally at the mercy of the court in which he originally was convicted. (See Rule 2-40A, Supreme Court of Indiana, fourth paragraph, set forth in Rules and Usages Being Questioned section of this petition.) Petitioner believes that the denial of equal protection which is inherent in this system is manifest and that he is entitled to at least those remedies afforded pauper convicts on "equal protection" grounds and that he and pauper convicts alike are entitled to not be subjected to the implied-waiver doctrine repeatedly resorted to in the Indiana appeals system on due process grounds.

CONCLUSION

For the reasons above stated, especially by the Indiana Supreme Court's pronouncement that petitioner has "waived" his rights to present newly discovered evidence and that the Indiana Supreme Court must exercise a "child-like faith in the inherent wisdom of the trial court" it is urged that petitioner has been denied his constitutional rights as described above.

It is therefore respectfully submitted that Certiorari should be granted and that the decision of the Indiana Supreme Court should be reversed, or in the aternative, that this Court should vacate said judgment and remand this cause to the Indiana Supreme Court for further proceedings not inconsistent with an appropriate opinion.

Respectfully submitted,

DEAN E. RICHARDS.
Counsel for Petitioner

PALMER K. WARD
Of Counsel